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No. 425

In the Supreme Court of the United States

October Term, 1964

BIRMINGHAM ICE & COLD STORAGE CO. AND SEARS WAREHOUSE CO., APPELLANTS

v.

SOUTHERN RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 425

BIRMINGHAM ICE & COLD STORAGE CO. AND SHAW WAREHOUSE CO., APPELLANTS

v.

SOUTHERN RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

MEMORANDUM FOR THE UNITED STATES

This suit was instituted by the United States on July 18, 1958, at the instance of the Interstate Commerce Commission, to protect the Commission's jurisdiction in a related proceeding then pending before it. The government's complaint sought an injunction against the Southern Railway and the tenants of a commodity terminal owned and operated by the railroad, to restrain them from violating the Elkins Act [1] and the Interstate Commerce Act [2] by the renting of facilities at the terminal for less than fair market

[1] 32 Stat. 847, as amended, 49 U.S.C. 41–43.
[2] 24 Stat. 386, as amended, 49 U.S.C. 20(9).

rentals, by the sale of such facilities at less than fair market value or by the extension of credit or any other advantage by the railroad to the tenants.[3] On October 6, 1959, the Commission issued its decision in the administrative proceeding. *Shaw Warehouse Co.* v. *Southern Railway Co.*, 308 I.C.C. 609, affirmed, 186 F. Supp. 29 (N.D. Ala. 1960). It found that the railroad had violated the Interstate Commerce Act by failing to include certain necessary elements in computing its rental charges; it ordered the railroad to cease and desist from such unlawful rental practices and to file an affidavit of compliance by a date eventually extended to September 1, 1960. On that date, the railroad filed such an affidavit, setting forth an increased rental schedule in purported compliance with the Commission's order.

On May 5, 1961, appellants herein, Birmingham Ice & Cold Storage Co. and Shaw Warehouse Co., intervened in the government's suit as parties plaintiff, seeking various forms of relief in addition to that requested by the government, including treble penalties in favor of the United States.[4] On September 1, 1961, the government amended its complaint, *inter alia*, to request an order compelling the tenants to pay the difference between the rentals they had actually been paying and those set forth in the railroad's affi-

[3] Temporary relief was rendered unnecessary by the parties' agreement that no conveyance of facilities would be made without 30 days' notice to the Commission.

[4] The Attorney General is authorized to seek such penalties under Section 1(3) of the Elkins Act, 32 Stat. 847, as amended, 49 U.S.C. 41(3).

davit of compliance from and after August 1, 1957,[5] or at least from and after September 1, 1960; treble penalties were not requested. On June 8, 1962, the court issued its memorandum opinion and decree, in which, on the basis of the Commission's order, it fixed the minimum monthly rental and minimum sales price for each of the facilities in the terminal; it enjoined the railroad and the tenants from paying or receiving less than the fixed sales prices or rentals; and it enjoined the railroad from advancing or pledging credit for the purchase of the facilities. The court ordered certain of the tenants to pay the fixed rentals from and after September 1, 1960; as to the others, such rentals were required to be paid from and after May 1, 1962. No treble penalties were awarded.

By the terms of the court's order, the United States prevailed in the main areas in which it sought relief. The judgment is adverse to the government only insofar as it requires certain tenants to pay the fixed rentals prospectively only (*i.e.*, from and after May 1, 1962) and denies the government's request that they be payable from August 1, 1957, or at least September 1, 1960. The court gave careful consideration to the government's contentions and recognized their merit; however, in the exercise of its discretion, it found that the equities did not require that all of the tenants pay the higher rents retroactively (J.S. App. C, pp. 23–24). The United States has decided not to appeal so much of the decision as is adverse to it for the reason that the granting or withholding of retrospective relief is usually within the discretion of a court of

[5] The date on which the premises were completed.

equity. Review of the court's decision is not considered necessary to the effective enforcement of the Interstate Commerce or Elkins Acts.

With respect to the appeal of the intervening plaintiffs, we believe there is considerable doubt whether private parties have standing to seek forfeiture to the United States of the treble penalties contemplated by the Elkins Act.[6] As to the other points raised by that appeal, the government takes no position.[7]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

OCTOBER 1962.

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[6] See note 4, *supra*; cf. 28 U.S.C. 2323.

[7] While two of the defendants in the proceeding below (Jefferson Warehouse & Cold Storage Co. and W. C. Hudlow, Jr.) have filed a notice of appeal in this Court, no jurisdictional statement has yet been filed, and this memorandum relates solely to the intervenors' appeal.

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